No. 14,843

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANCES FARRINGTON WHITTEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITTEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,
Appellants,

vs.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. MCGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,
Appellees.

On Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLEES.

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Appellees.

On Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLEES.

JURISDICTION.

This is an appeal from a final judgment of the Supreme Court of Hawaii rendered on May 26, 1955, denying appellants' petition for writ of prohibition (R. 50). Notice of appeal was filed on May 31, 1955 (R. 52) accompanied by an affidavit of counsel that the value in controversy exceeds $5,000 exclusive of interest and costs (R. 53).

Jurisdiction of the court below was founded upon Section 81 of the Hawaiian Organic Act (31 Stat. 157; 48 U.S.C. Sec. 631) and Section 10270 of the Revised Laws of Hawaii 1945. Jurisdiction of this Court rests on 62 Stat. 929 (28 U.S.C. Sec. 1293).

STATEMENT OF THE CASE.

This is an appeal from the final judgment of the Supreme Court of Hawaii denying a petition for writ of prohibition (R. 50). The petition, filed in the court below on April 26, 1955, sought a writ prohibiting the Circuit Judge from proceeding further with a case then pending before him entitled "In the Matter of the Trust Estate of Wallace R. Farrington, Deceased" (R. 1-9). That case came before the trial judge on July 30, 1954, on the petition of Edmond H. Leavey to be named successor trustee of the Farrington trust (R. 2). Elizabeth P. Farrington, Hawaii's delegate to Congress, and her two adopted children, filed an answer on August 5, 1954, denying Mr. Leavey's right to be named trustee, and a cross complaint asking the court to name successor trustees and nominating four persons from whom they prayed that the trial judge select three (R. 3, 78-82).

The cross complaint joined the appellants as parties. The appellants answered the cross complaint on August 26, and also filed a cross complaint alleging that they, as surviving children and grandchildren of Wallace R. Farrington, deceased, had a right to name the successor trustees because they constituted a ma-

jority in number and in interest of those having vested interests in the trust estate under Section 12572, Revised Laws of Hawaii 1945 (R. 3; Appendix I). Appellees answered this cross complaint on August 30, denying that appellants had sufficient vested interests to permit them to name successor trustees (R. 3). After a pretrial conference, an order was entered requiring the parties to brief the questions (1) whether Mr. Leavey was entitled to be named trustee and (2) whether the grandchildren of Wallace R. Farrington had vested interests in his trust estate. Appellees took the negative position on both questions. On October 26 the trial court ruled on these two questions, adopting the view urged by appellees (R. 3, 111).

On November 4 appellants filed an amended answer and cross complaint alleging that appellants Ruth Farrington Leavey and Frances Farrington Whittemore had the right to name successor trustees under Section 12572 because they had a majority in number and interest of the vested interests in the trust (R. 4, 111-112). This posed the fundamental question whether the adopted children of the deceased son of the testator had any interest in the trust estate (R. 112). Appellants moved for summary judgment on their amended cross complaint on November 10, 1954, and the matter was briefed and argued (R. 112). Before the trial court had decided this question, appellants moved, on January 3, 1955, for leave to file a second amended answer and cross complaint (R. 93, 95, 112). This motion was taken under advisement.

On March 7 the trial judge denied the motion for summary judgment and decided the law question involved in favor of appellees (R. 5, 112, 113).

On March 13, 1955, the term of United States District Judge J. Frank McLaughlin expired and on March 17, 1955, the trial judge permitted his name to be circulated, along with others, among the bar for endorsement as Judge McLaughlin's successor (R. 10-c, 10-f). On March 21, 1955, appellants sought to obtain final orders dismissing the petition of Mr. Leavey and their amended cross complaint, explaining that they desired to take an appeal from the adverse rulings of the court before trustees were appointed. These motions were opposed on the ground that the only matter left for determination was the appointment of successor trustees. The court took the motions under advisement (R. 5, 113). A month later, appellant Whittemore filed her affidavit of disqualification.

The trial court denied the motion to disqualify on April 25 (R. 10-h), and on April 26 appellants filed their petition for writ of prohibition. The affidavit in substance sets forth that the trial judge submitted his name for and received the endorsement of the Bar Association of Hawaii for appointment as a judge of the United States District Court, and that appellee Elizabeth Farrington, a litigant adverse to affiant, is Delegate to Congress from Hawaii and has power to help or hinder his appointment, which he should know from his political experience and from the press (R. 10-c to 10-f, 19-20). Affiant therefore

asserts that she believes that the trial judge had a personal bias and prejudice in favor of Elizabeth Farrington in the matter pending before him (R. 10-c, 20). The petition for writ of prohibition was argued orally and denied on May 19, 1955 (R. 11).

On May 31 the trial court heard arguments on a motion to stay proceedings pending this appeal and heard evidence relating to the qualifications of nominees for the trusteeship proposed by appellees (R. 135-164). The next day, June 1, 1955, the court entered an order finally disposing of all issues pending before him, including the appointment of trustees effective upon the filing of an approved bond (R. 110-115). On that same day, counsel for appellants applied to the Supreme Court for an order staying further proceedings before the trial judge until the determination of this appeal. The Supreme Court granted the motion in order that an appeal to this Court would not be deemed moot (R. 62-63, 125).

STATUTES AND APPLICABLE CANON.

The applicable provisions of the Hawaiian Organic Act and Statutes of Hawaii are set forth in Appendix I, and the applicable Judicial Canon is contained in Appendix II.

QUESTIONS PRESENTED.

This appeal involves the single question whether the Supreme Court of Hawaii properly refused to

issue a writ commanding the trial judge to halt further proceedings before him in the Estate of Wallace R. Farrington. This question has two parts:

(1) Did the Supreme Court of Hawaii err in holding the affidavit of disqualification insufficient under Section 9573, R.L.H. 1945?

(2) Did the Supreme Court of Hawaii err in refusing to prohibit the trial court from continuing to act?

We submit that both questions should be answered in the negative.

SUMMARY OF ARGUMENT.

An affidavit of disqualification must allege facts which will reasonably support an inference that the judge is prejudiced or biased. The affidavit in this case contains no facts from which a sane and reasonable mind could infer bias or prejudice. Nor does it show a violation of any canon of judicial ethics by the trial judge. The Supreme Court of Hawaii correctly held the affidavit of disqualification to be legally insufficient and properly refused to issue the writ.

The affidavit does not allege that the trial judge has any direct or indirect pecuniary interest in the outcome of the litigation before him.

The judgment of the court below correctly applied ordinary legal principles and should be affirmed.

ARGUMENT.

I.

THE RULING OF THE SUPREME COURT THAT THE AFFIDAVIT WAS LEGALLY INSUFFICIENT WAS CORRECT AND SHOULD BE AFFIRMED.

A. The affidavit failed to assert facts which would support a reasonable inference that the trial judge was prejudiced in favor of appellee Elizabeth Farrington.

The Supreme Court of Hawaii, in testing the sufficiency of the affidavit (R. 19), required that it should set forth "the reasons and facts for the belief the litigant entertains" and that these reasons and facts "must give fair support to the charge of a bent of mind which may prevent or impede impartiality of judgment." Thus the court below applied the standard adopted in *Berger v. United States,* 255 U.S. 22, 33 (1921), on the ground that the federal statute (36 Stat. 1090, 28 U.S.C. Sec. 144) is similar to the local statute (Sec. 9573, R.L.H. 1945) and there were no controlling precedents under the latter.

Reviewing the "reasons and facts" contained in the affidavit and purporting to support the charge of prejudice, the court below summarized the substance of the affidavit as follows:

> In substance—except for conjectures and opinions of affiant—the affidavit sets forth as being the reasons and facts for the belief which the affiant entertains, no more than that Judge McGregor has submitted his name for and received the endorsement of the Bar Association of Hawaii for appointment as a judge of the United States District Court for Hawaii, to succeed a

> present judge thereof whose term has expired; that Elizabeth Farrington (a litigant adverse to said Frances Farrington Whittemore) is the Delegate to Congress from Hawaii, and, as such, is able to further or to hinder the appointment of Judge McGregor to the judgeship for which he has received said endorsement; that Judge McGregor is aware of said ability of Elizabeth Farrington in her said political capacity and is also aware of press reports of her success in obtaining nominations by the President of the United States of others to judgeships in Hawaii, and also in obtaining confirmations by the United States Senate of such nominations; and that the affiant therefore believes that Judge McGregor has a personal bias and prejudice favorable to Elizabeth Farrington as a litigant adverse to said Frances Farrington Whittemore. . . . (R. 19-20.)

The court below held that the affidavit lacked requisite "definiteness of time and place and character of remarks or actions" which would "give fair support to a charge that the trial judge has a bent of mind that may prevent or impede impartiality of judgment . . ." (R. 20-21.)

In deciding that the affidavit must allege facts supporting a charge of a prejudicial bent of mind, the court followed settled Hawaiian law relating to the construction of similar affidavits. Thus where an affidavit was filed in support of a suggestion of disqualification for interest, the court found the affidavit deficient for failure to state facts from which the

court might determine whether a ground for disqualification exists.

> *Carey v. Discount Corp.,* 35 Hawaii 786 (1941).

The court there said:

> Ordinarily the suggestion of disqualification or affidavit filed in support thereof should set forth the facts upon which the alleged disqualification is based and not mere conclusions of law. (p. 787.)

Furthermore, the court construed R.L.H. 1945, Sec. 9573, in a manner consistent with the intention of the legislature expressed at the time the act was passed. The act first became law as Act 292, S.L.H. 1931. The committee report of the House Committee on Judiciary reads in part as follows:

> The purpose of the Bill is to provide for the disqualification of judges having personal bias or prejudice against a party to litigation, or in favor of an opposite party. The effect of the bill would be to disqualify judges who are biased one way or the other with reference to litigation pending before such judge.

The act gives a remedy against judges "who are biased." Clearly an objective standard was intended. The judge is recused only if facts are stated from which a reasonable person would draw an inference of prejudice on the part of the judge.

The federal statute has been similarly construed. The power of the judge to pass upon the sufficiency

of the facts and reasons stated in the affidavit cannot be controverted.

Berger v. United States, supra;

Ex parte American Steel Barrel Co., 230 U.S. 35, 45 (1913);

Price v. Johnston, 125 F. 2d 806, 811 (9th Cir. 1942).

The affidavit must state facts "which taken at their face value show bias and prejudice" and not "mere conclusions".

Calvaresi v. United States, 216 F. 2d 891, 900 (10th Cir. 1954).

> Accordingly, the question in all such cases is whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias and prejudice on the part of the judge.

Hurd v. Letts, 152 F. 2d 121, 123 (D.C. Cir. 1945).

What are the facts in this affidavit which appellants claim will support a reasonable inference of bias and prejudice on the part of the trial judge? Justice McKinley, dissenting, gave his interpretation on the gravamen of the affidavit (R. 37):

> . . . that on top of the relationship of judge and litigant the presiding judge superimposed a conflicting relationship, to wit, candidate for United States District Judge of Hawaii and territorial delegate from Hawaii

and this "incompatible relationship with one of the litigants" was brought about "by his voluntary act."

Appellants adopt this statement as a demonstration that the facts contained in the affidavit satisfied "the standards laid down in the Berger case." (Br. p. 18.) The basic fact in the affidavit is that the judge sought the endorsement of the Hawaii Bar Association for the position of United States District Judge at a time when an influential political personage was a party to litigation before his court. Since this party may exert influence for or against the judicial appointment, it is argued that the act of becoming a candidate for the federal judgeship "gives fair support to a charge of a bent of mind which may prevent or impede impartiality of judgment" and that from this fact "a sane and reasonable mind might fairly infer personal bias and prejudice on the part of the trial judge."

There are no allegations that the trial judge said or did anything which would lead a reasonable person to believe he intended to favor the influential party litigant. The charge is based on the "incompatible relationship" from which it is inferred that this judge will favor the party who may have some influence on the outcome of his judicial aspirations, rather than do impartial justice. On this basis the judge must face the

> ugly challenge for a judge to meet because it involves his state of mind and causes the plain inference that he would disregard his oath of office to preside fairly, impartially and justly.
>
> Foley J., in *United States v. Titus,* 122 F. Supp. 179 (N.D. N.Y. 1954).

Judge McGregor has sworn that he ". . . will administer justice without respect to persons. . . ."[1] His acts are "clothed with the presumption" that he will do so.

> *Ferrari v. United States,* 169 F. 2d 353, 355 (9th Cir. 1948).

At most, the affidavit reflects

> . . . a supposition by the affiant of the judge's bias and prejudice and a disregard of any presumption in favor of his integrity. . . . (Rice J., majority opinion, R. 21.)

Are we to assume that the trial judge will disregard his oath of office and respect the person of Delegate Farrington and seek her favor in the hope that she will repay him with her support? This appears to us (as it did to the Supreme Court) a startling and unwarranted assumption. The same charge could be brought against any judge in any court before whom appear persons of affairs, power, influence or wealth. All the dissatisfied party need do is allege that the powerful person might exercise some influence on matters in which the presiding judge is interested. To be sure, as Justice Cardozo has reminded us, judges are subject to human limitations (Cardozo, *The Nature of the Judicial Process* 168 (1921)); but is this admitted sociological phenomenon to be made a vehicle to attack qualifications to sit as a judge, or to be a substitute for an appeal to correct his errors? In Hawaii,

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[1]Oath of office for United States judges, 28 U.S.C., Sec. 453.

where our judges, both territorial and federal, are probably less secure in their posts and incomes than any other judges in the world,[2] it would always be possible to charge a trial judge with respect for persons by claiming that he will favor important litigants to secure his own future.

This is not the interpretation of Section 9573 by our Supreme Court. Nor is it a proper construction of the federal counterpart. More than the mere relationship between aspirant judge and politically influential party must be asserted, for no sane and reasonable mind can infer prejudice from the relationship alone. A prejudicial bent of mind must be alleged. This is what Justice Rice meant when he said the affidavit lacked ". . . definiteness of time and place and character of remarks or actions by the trial judge. . . ." (R. 20.)

The mere fact that a judge occupies premises encumbered with a restrictive covenant with respect to race does not disqualify him from hearing a petition to have a similar covenant declared void. To infer personal bias and prejudice from this relationship would be a "farfetched conclusion."

Hurd v. Letts, 152 F. 2d 121, 122 (D.C. Cir. 1945).

Similarly, an allegation that the judge was connected with a bank in the vicinity of the bank which

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[2]Although territorial judges have a stated term of 4 years and judges of the U. S. District Court for Hawaii 6 years, both are removable at the will of the President. See Haynes, *Selection and Tenure of Judges* 11 (1st Ed. 1944).

affiant was accused of robbing was insufficient to show bias. The relationship of banker and bank robber was not so incompatible with impartiality of judgment that the judge should have recused himself in the absence of other facts showing a personal prejudice against the defendant.

Price v. Johnston, 125 F. 2d 806 (9th Cir. 1942).

In *Fieldcrest Dairies v. City of Chicago,* 27 F. Supp. 258 (N.D. Ill. 1939), the plaintiff charged that the judge was prejudiced in favor of the City of Chicago because he was dominated by the mayor and leading political organization and they desired to sustain the ordinance under attack. Holding the affidavit insufficient, the court said (p. 260):

> Without a statement of the name of the informant, the time, the place and the occasion of the statement and of the substance of what was said and of facts supporting the conclusions stated in paragraph 6 of the affidavit, such affidavit is clearly insufficient.

Hence an allegation that the judge is dominated is insufficient without a statement of facts supporting the conclusion of domination.

The affidavit in question differs significantly from that in any of the decided cases. In those cases, the affiant charges that the judge has said or done something which has given rise to a reasonable belief of prejudice. The court reviews the facts and determines whether the belief of the affiant is reasonable. If so, he is disqualified. The affidavit here involved sets forth no word or deed of the judge from which

prejudice can be inferred. Instead, it sets forth the situation of the judge and the party, and asks the court to assume that the judge will violate his oath and sell his judgment for the Delegate's support. It further assumes that the Delegate, as a public officer, would violate her oath of office and make a corrupt bargain with the judge. In no case has such an affidavit of insinuation been held sufficient to recuse a judge.

Appellants advance the novel argument that the trial judge's refusal to recuse after finding the affidavit legally insufficient is in itself a basis for a finding that he is prejudicial (Br. p. 15). On the contrary, it is generally considered "the duty of the judge, when the showing for recusation is insufficient, to remain in the case."

> *Eisler v. United States,* 170 F. 2d 273, 278 (D.C. Cir. 1948); cert. dism. 338 U.S. 883 (1949); *Sanders v. Allen,* 58 F. Supp. 417, 420 (S.D. Cal. 1944).

On pages 8 and 9 of their brief, appellants describe subsequent proceedings which took place in the circuit court *after* entry of the judgment appealed from. Ostensibly these proceedings were included in the record to show that the case is not moot. However, they argue that it reveals

> a course of judicial behavior unexplainable except in the light of a clear bias in favor of the Delegate and cannot but demonstrate that affiant's belief was borne out by subsequent events. (Br. p. 24.)

Anticipating that appellants would attempt to use the court's subsequent adverse rulings to bolster up their deficient affidavit, we moved to strike that portion of the designation of the record which included proceedings after judgment. The Supreme Court denied the motion on the apparent ground that it lacked power under Rule 75 (h) of the Federal Rules of Civil Procedure to strike the extraneous matter. Judge Rice, dissenting, stated that these matters

> were not before or a part of the record of this supreme court or given consideration by us when our rulings were made. . . .[3]

Had the affidavit itself recited various adverse rulings, no matter how stringent or severe, it would have been insufficient.

> *Calvaresi v. United States,* 216 F. 2d 891, 900 (10th Cir. 1954).

Appellants' reliance on subsequent adverse rulings to fortify their claim of disqualification gives a clue to what prompted the filing of the affidavit. The history of the proceedings is recounted in the Statement of the Case. The proceeding was commenced by Edmond H. Leavey on July 30, 1954, seeking appointment as trustee. Thereafter the parties to this appeal joined issue on several questions of law. Two of these questions were decided after full briefing on October 26, 1954 (R. 3). After this adverse ruling on their first contentions, appellants filed an amended cross complaint on November 4, 1954 (R. 4). On November

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[3]The decision and dissenting opinion on this motion are made part of this brief as Appendix III.

10, 1954, appellants moved for summary judgment on their amended cross complaint (R. 4). The judge decided the "controlling issue of law" on March 7, 1955.[4] The affidavit was filed on April 22, 1955. The only issue then remaining was the appointment of a successor trustee or trustees. This, it had been decided, lay within the discretion of the judge.

This history of rulings adverse to appellants[5] shows that all substantial issues had already been decided before the affidavit was filed. From the prior rulings made against appellants, and their argument based on adverse rulings subsequent to the affidavit, one can readily infer that the interest in removing the judge is that of an unsuccessful litigant. But the statutory procedure is not established to permit paralysis of judicial action during the case.

Taylor v. United States, 179 F. 2d 640 (9th Cir. 1950).

The federal cases hold that the facts in the affidavit are of "paramount importance" *United States v. Onan,* 190 F. 2d 1 (8th Cir. 1951); Cert. denied 342 U.S. 869 (1951). However, appellants argue that litigants should believe that judges before whom they appear are unbiased, and this is as important as factual impartiality (Br. p. 23). We have no argu-

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[4]The basic question of the case, whether adopted children of the son of the testator were "issue" of the testator. The trial court followed the controlling Hawaiian decision, *O'Brien v. Walker,* 35 *Hawaii* 104 (1939); aff'd. 115 F. 2d 956; cert. denied, 312 U.S. 707.

[5]An additional statement of the circuit court proceeding may be found in the trial judge's order of June 1, 1955 (R. 110-115).

ment with this principle. But a litigant's belief of bias or prejudice must be supported by facts from which a sane and reasonable mind "might fairly infer bias or prejudice on the part of the judge." We deny appellants' conclusion that the affidavit in question not only sets forth such facts, but that the judge who held the present affidavit insufficient showed "an arrogant disregard" for the principle that "justice must satisfy the appearance of justice" (Br. p. 23).

The affidavit is tested either to see whether the facts alleged support an inference of prejudice or to decide if the facts make the affiant's belief of prejudice reasonable. The same objective standard is applied in either test. Could a sane and reasonable mind fairly infer bias or prejudice from the stated facts? Appellants cite only the judge's candidacy for the federal bench and the fact that one litigant is Hawaii's delegate to Congress to support the rash charge that he has arrogantly disregarded the appearance of justice. Where are the facts? Implicit throughout appellants' brief is the idea that given the relationship of judicial candidate and politically important litigant, it follows that the judge will be partial. We deny that the conclusion follows upon the premise. The relationship arises from the background and associations of the parties (cf. *Price v. Johnston, supra*) and does not show a prejudice "regarding the justiciable matter pending before the court."

Eisler v. United States, supra.

Appellants also assert that the judge-litigant relationship here renders impartiality less likely than

disqualifying relationships of affinity or consanguinity (Br. p. 17), apparently taking issue with the old saw that "blood is thicker than water." This assertion contains the fundamental error in appellants' reasoning. They cannot support their claim under Section 9573 for they have no facts upon which to base an inference of a biased or prejudiced bent of mind. Actually, they object to this so-called relationship where the party litigant is in a position to speak for the trial judge whether he wants it or not—whether he needs it or not. But this relationship does not show prejudice under Section 9573 as construed by the Hawaii court, nor is it a relationship of affinity or consanguinity prohibited by Section 84 of the Hawaiian Organic Act.

Appellants are trying to create a new ground for disqualification, based on a cynical and erroneous assumption that at some time and under some circumstances all judges are apt to be respecters of persons in pursuit of self-gratification. We deny the basic assumption. We deny that it is either desirable or beneficial in the administration of justice to enlarge the grounds upon which a litigant may oust a judge from proceeding in a case regularly set before him.

The comment of the Court of Appeals for the Seventh Circuit in *Tucker v. Kerner,* 186 F. 2d 79 (7th Cir. 1950) at page 84, is particularly apt:

> Plaintiff places much reliance and in its brief quotes copiously from *Berger v. United States,* 255 U.S. 22, 41 S. Ct. 230, 65 L. Ed. 481. He fails, however, to state the facts alleged in the affidavit

> in that case, which are about as far from those alleged here as the North Pole is from the South.

B. Canon 30 of the Canons of Judicial Ethics is inapplicable.

Appellants argue that the judge's act of becoming a candidate for judicial office and sitting as judge in a case where Hawaii's delegate to Congress is a party violates Canon 30 of the Canons of Judicial Ethics (Br. p. 27). It is then argued that this violation strengthens the "fair support" which the affidavit gives to an inference of prejudice on his part (Br. pp. 25, 27). On the other hand, appellants admit

> that a violation of Canon 30 is not of itself a ground for disqualification . . . under Section 9573 of the Revised Laws of Hawaii.

But the judge's act which appellants say violates Canon 30, i.e., declaring himself a candidate for the federal judgeship (Br. p. 27), is the same act which appellants have argued is ample grounds for disqualification under Section 9573 (Br. p. 17).

Canon 30[6] enjoins a judge not to become a candidate for any political office *other than a judicial office,* and states that a judge running for political office should resign. The reason given for stating he should resign is

> in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

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[6]Judicial Canon 30 is set out in full in Appendix II.

Judges, however, are free under the canon to become candidates for judicial office.[7] The act of the trial judge in announcing his candidacy is expressly permitted by its terms. However, the canon adjures judges who are candidates for judicial position to

> refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

Appellants claim that the judge's act of declaring himself a candidate for judicial position would tend to arouse suspicion of abuse of judicial power because Delegate Farrington is a litigant in a dispute before him arising out of a family trust. The claim is without substance.

Obviously, to determine whether a reasonable suspicion exists, one must determine whether a sane and reasonable mind would believe that the judge is abusing his power, or that he is incapable of judging impartially. Just as the affidavit contains no facts to support an inference of prejudice, so it fails to support a reasonable suspicion of abuse of judicial power.

Since Canon 30 permits the trial judge to be a candidate for the federal judgeship, we fail to see

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[7]In all the states, apparently, any judge may be a candidate for any judicial office. Haynes, *Selection and Tenure of Judges* 17 (1st Ed. 1944). For a review of the political activities of judges in seeking election either to judicial or to nonjudicial office (despite the provisions of Canon 30) see Vanderbilt, *Minimum Standards of Judicial Administration* 15-17 (1st Ed. 1949).

how appellants can charge him with violating the canon by that very act.[8]

Section 9603, Revised Laws of Hawaii, provides as follows:

> *Superintendence of inferior courts.* The Supreme Court shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses therein where no other remedy is expressly provided by law.

Appellants specified as one of the errors of the court below (Error 3, Br. pp. 9-10) that it failed to issue the writ pursuant to its general superintending power to prohibit the judge from violating Canon 30. However, appellants appear to have abandoned this ground in their brief, although it is mentioned in argument heading (Section I B, Br. p. 25). In any event, it seems obvious that if no adequate ground for disqualification is stated in the affidavit, the Supreme Court of Hawaii did not commit manifest error in refusing to prohibit the trial judge from sitting.

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[8]Canon 13 is more appropriate to appellants' charge, since it prohibits a judge from allowing his conduct to give the impression "that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person." The affidavit actually charges that in affiant's belief Delegate Farrington can improperly influence the Judge and will unduly enjoy his favor and that he is affected by her rank, position or influence. But the only conduct which has given affiant that impression is the Judge's candidacy for judicial office. Therefore appellants retreat to Canon 30 dealing with candidacy, which, as we have shown, has no application to this case.

II.

THE TRIAL JUDGE WAS NOT DISQUALIFIED UNDER SECTION 84 OF THE HAWAIIAN ORGANIC ACT BY REASON OF PECUNIARY INTEREST.

The petition for the writ filed by appellants in the Supreme Court raised no question concerning disqualification under Section 84 of the Hawaiian Organic Act (R. 1-9). The basis upon which the writ was sought was disqualification under Section 9573 (R. 7). As a consequence, the opinion of the court (R. 14-28) did not discuss any question of disqualification for pecuniary interest. This was raised for the first time in the petition for rehearing before the court below (R. 45). The petition for rehearing was denied without argument (R. 48-49).

The affidavit does not state any pecuniary interest which the judge has in the outcome of the litigation concerning the Farrington trust, either directly or through a relative within the prohibited degree of affinity or consanguinity.[9]

Appellants reason by a series of speculations (Br. pp. 28-32) that (1) if Judge McGregor decides in favor of Delegate Farrington then (2) Delegate Farrington might support him in his judicial candidacy and (3) he might then be appointed United States District Judge for the District of Hawaii and (4) if he is so appointed, his annual compensation will be substantially increased. This argument of pyramided

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[9]For the full text of Section 84, Hawaiian Organic Act, dealing with disqualification for relationship or pecuniary interest, see Appendix I.

hypotheses certainly does not warrant a finding that the trial judge has a direct (or indirect) pecuniary interest in the issue of the case before him. As was said in *Inhabitants of Northampton & Others v. Smith & Others,* 11 Metc. (52 Mass.) 390, 395 (1846) (quoted with approval in *Carey v. Discount Corporation,* 35 Hawaii 786, 787 (1941)):

> It (the disqualification) must therefore depend upon facts capable of being precisely averred and proved, and thus put in issue and tried.

And in *People v. Whitridge,* 129 N.Y.S. 300, 304 (1911) (also quoted with approval in the *Carey* case, *supra*), the New York court said:

> The interest which will disqualify a judge to sit in a cause need not be large, but it must be real. It must be certain, and not merely possible or contingent; it must be one which is visible, demonstrable, and capable of precise proof.

We submit that the imaginative reasoning of appellants as to the trial judge's pecuniary interest is no substitute for visible, demonstrable and precise proof. The court below, having no such proof before it, properly refused to rule that the trial judge was disqualified to sit by reason of a pecuniary interest in the cause before him.

Appellants rely on *Re Murchison,* 23 U.S. Law Week 4219, 99 L. Ed. 551 (Adv. Rep. 1955), in making their argument that the judge has a pecuniary interest requiring his disqualification. That case presented the question whether a judge acting as a "one man judge-grand jury" under Michigan law could act

as judge in the trial of witnesses accused of contempt of him in his capacity of judge-grand jury. The Supreme Court held that it was a violation of due process for the "judge-grand jury" to try the petitioners. Since the "judge-grand jury" is a part of the "accusatory process," he cannot be "in the very nature of things, wholly disinterested in the conviction or acquittal of those accused."

In the *Murchison* case, the "interest" of which Justice Black spoke was the interest of a prosecutor to secure a conviction. His language affords no basis for concluding that the trial judge has a pecuniary interest in the outcome of the civil litigation relating to the Farrington family trust.

III.

THE SUPREME COURT'S CONSTRUCTION OF SECTION 9573, R.L.H. 1945, IS NOT MANIFESTLY ERRONEOUS AND SHOULD BE AFFIRMED.

This case presented to the Supreme Court of Hawaii a question of construction of the local judicial disqualification statute (Sec. 9573, R.L.H. 1945). That court construed both the statute and the affidavit strictly, following several federal cases construing the similar federal statute (28 U.S.C. Sec. 144) in so doing, and held that the affidavit of disqualification was legally insufficient (R. 18, 19, 22).

The rule relating to the review of decisions of the Supreme Court of Hawaii is well settled. *Waialua Agricultural Co. v. Christian,* 305 U.S. 91 (1938)

In *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368 (1949), the Supreme Court recognized that the territorial courts "are the natural sources for the interpretation and application of the acts of their legislatures. . . ."

This court has refused to upset "what appears to be a reasonable construction placed by the Supreme Court of Hawaii upon the controlling statute."

> *Ward v. Booth,* 197 F. 2d 963, 969 (9th Cir. 1952).

See also *Di Mello v. Fong,* 164 F. 2d 232 (9th Cir. 1947), which involved an interpretation of a private act and of the Hawaiian Organic Act.

The decision appealed from finds ample support in federal cases (pp. 9, 10, 13, 14, *supra*). It is an informed effort on the part of the Supreme Court of Hawaii to apply the standards of the *Berger* and other federal cases to the construction of the Hawaiian statute. Our local statute is substantially the same as the federal act, but the fact that the court below relied on federal cases in reaching its decision does not change the rule that

> the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.
>
> *Waialua Agricultural Co. v. Christian, supra* p. 109.

Far from being "manifestly erroneous", an examination of the decision of the court below (R. 14-28) reveals that it is in full agreement with ordinary legal

principles. We submit that the judgment below should be affirmed.

CONCLUSION.

For the foregoing reasons, the decision of the Supreme Court of Hawaii refusing to issue a writ should be affirmed.

Dated, Honolulu, Hawaii,
November 14, 1955.

Respectfully submitted,
J. GARNER ANTHONY,
WILLIAM F. QUINN,
Attorneys for Appellees.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendices I, II and III Follow.)

Appendix.

Appendix I

STATUTES INVOLVED.

Hawaiian Organic Act, Sec. 84 (U.S.C. Sec. 636):

Sec. 84. *Disqualification by relationship, pecuniary interest, or previous judgment.* That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which said judge or juror has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the legislature of the Territory may add other causes of disqualification to those herein enumerated. (31 Stat. 157; 36 Stat. 258; 48 U.S.C. 636).

Revised Laws of Hawaii 1945, Section 9573:

Sec. 9573. *Disqualification of judge; bias or prejudice.* Whenever a party to any suit, action or proceeding, whether at law, in equity, criminal, or special proceeding, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal basis or prejudice either against him or in favor of any opposite party to the suit, such judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good

cause shall be shown for the failure to file within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify himself by filing with the clerk of the court of which he is a judge a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action. (L. 1931, c. 292, s. 1; R.L. 1935, s. 3572.)

Revised Laws of Hawaii 1945, Section 12572:

Sec. 12572. *Nomination by beneficiaries; appointment of trustees.* Whenever any appointment of a trustee under a private trust shall be made by any judge of a court of record, if, prior to such appointment, beneficiaries who shall constitute a majority both in number and interest of the beneficiaries of such trust (as hereinafter defined) shall nominate for such trusteeship by an instrument or instruments in writing filed in said court any qualified person or corporation worthy in the opinion of such judge to be appointed, such judge shall appoint said nominee as such trustee, unless the express terms of the trust provide an effective method of nomination or appointment; *provided* that no person so nominated as trustee by the beneficiaries of any such trust shall be held disqualified to be appointed or to act as such trustee for the sole reason that he or she is a beneficiary or a possible beneficiary under such trust estate.

Majority etc., how determined. The term 'majority both in number and interest of the bene-

ficiaries of such trust,' as used in the foregoing provisions, shall mean a majority of the competent adult beneficiaries holding more than one-half of the value of the then vested interests held by all the competent adult beneficiaries in the trust; *provided* that, if the guardian of any spendthrift, non compos person, or minor, owning such a vested interest, when such guardian is not an adult beneficiary, or married to an adult beneficiary, of such trust, shall execute or join in the execution of any such instrument of nomination and present the same to the court (each such guardian being hereby authorized in his discretion either to execute or to refrain from executing such instrument of nomination, as in his judgment shall be in the best interest of his ward), then and in such event such spendthrift, non compos person or minor, and the value of his said interest shall be included in determining such majority both in number and interest of the beneficiaries of such trust. The value of the then vested interests shall be determined as of the date of the presentation of such instrument or instruments of nomination to the court, in the manner provided for the appraisal of similar interests under the laws of the Territory for inheritance tax purposes and as the same would be valued for said purposes if said trust had been created by instrument made in contemplation of the death of the person who created such trust and said trust had come into existence and said death had occurred on said date of presentation of said instrument or instruments of nomination; when more than one such instrument is presented to the court designating the same nominee, said

date of presentation for the purposes of this section shall be deemed to be the date when the last of such instruments is so presented.

This section shall apply to trusts created before, as well as to those created after April 28, 1943. (L. 1943, c. 68, s. 1 and part of s. 2.)

Appendix II

JUDICIAL CANON 30. CANDIDACY FOR OFFICE.

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position, he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power and prestige of his judicial position to promote his candidacy or the success of his party.

If a judge becomes a candidate for judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

Appendix III

In the Supreme Court of the Territory of Hawaii, October Term 1954.

Frances Farrington Whittemore, Ruth Farrington Leavey, Edmund H. Leavey, Jr., Catharine Farrington Hite, Joan Whittemore Close, Catharine Anderson Leavey, Alice Farrington Leavey, Charles Harrison Hite, Patricia Farrington Hite and Wallace Rider Farrington Close v. Elizabeth P. Farrington, John Farrington, Beverly Farrington Richardson and Calvin C. McGregor, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii.

No. 3032.

PETITION FOR WRIT OF PROHIBITION

Decision Upon Motion for Determination of Matters Contained in Record and to Strike Portion of Designation of Contents of Record on Appeal.

Argued June 27, 1955. Decided June 27, 1955.

Towse, C. J., Rice, J., and Circuit Judge McKinley in Place of Stainback, J., Disqualified.

The respondents' motion for determination of matters contained in the designation of contents of the record on appeal and to strike items 13(d), 13(e),

13(f), and 13(g) from said designation is denied, Mr. Justice Philip L. Rice dissenting.

Dated: Honolulu, Hawaii, June 30, 1955.

/s/ Edward A. Towse,
Edward A. Towse, Chief Justice.
/s/ Frank A. McKinley,
Frank A. McKinley, Circuit Judge,
Substitute Justice.

Mr. Justice Rice, Dissenting.

I would grant instead of deny the respondents' motion for determination of matters contained in the designation of contents of the record on appeal and to strike items 13(d), 13(e), 13(f), and 13(g) from said designation.

It is my understanding of Rule 75(h) of the Federal Court Rules that this supreme court is the proper one—and has jurisdiction thereunder—to settle the record made to conform to the truth.

The opinion of this supreme court denying the petition for writ of prohibition in our number 3032 was entered and filed on May 19, 1955, and our decision denying a petition for rehearing thereof was entered and filed on May 25, 1955.

The referred-to items 13(d), 13(e), 13(f), and 13(g) are in re proceedings had in the trial court "In the Matter of the Trust Estate of Wallace R. Farrington, Deceased," numbered civil number 139, which were not before or a part of the record of this

supreme court or given consideration by us when our rulings were made which, respectively denied the petition for writ of prohibition herein and for a rehearing thereof, so, such items should not be incorporated in the record on the appeal from our said rulings to the United States Circuit Court of Appeals, Ninth Circuit.

/s/ Philip L. Rice.